Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-967

BRYAN FLOYD,
Petitioner

versus

STATE OF ALABAMA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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The petitioner, Bryan Floyd, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Alabama entered in this proceedings September 21, 1979.

OPINION BELOW

The judgment and opinion of the Court of Criminal Appeals of Alabama was rendered December 19, 1978. An Application for Re-hearing was filed on January 2, 1979, and overruled on January 16, 1979. The opinion of the Court of Criminal Appeals of Alabama is reported in 375 So.2d277, and appears in the Appendix hereto. A Writ of Certiorari to the Court of Criminal Appeals was granted by the Alabama Supreme Court on March 20, 1979. The Writ was quashed as improvidently granted on September 21, 1979. The opinion by the Alabama

Supreme Court quashing the writ is reported in 375 So.2d 280, and appears in the Appendix hereto. The opinions have not yet been reported in the official text.

JURISDICTION

The Petition for Writ of Certiorari to the Court of Criminal Appeals of Alabama was quashed as improvidently granted by the Supreme Court of Alabama which entered its judgment on September 21, 1979. The Court of Criminal Appeals of Alabama granted a stay of execution of Judgment for ninety (90) days from September 21, 1979, in order for petitioner to effect a Petition of Writ of Certiorari to the Supreme Court of the United States. This Petition for Writ of Certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTION PRESENTED

Whether a statement made by petitioner in response to a question initiated by a police officer and while in custody was improperly admitted against the petitioner at trial and therefore violative of his Fifth, Sixth, and Fourteenth Amendment Rights under the United States Constitution?

STATEMENT OF THE CASE

The petitioner was discovered laying on the floor in the entrance of a public restroom. The Defendant's pants and underwear were around his feet. Lying on a shirt inside the restroom were certain articles or items. Among the items found there was a piece of cellophane with a white substance contained therein. The petitioner was

taken to the emergency room at a local hospital, where he received a narcane injection. A police officer, while picking up the items found in the restroom, pricked his finger on a needle. At the hospital in the emergency room, while in the presence of the petitioner, the police officer told the petitioner's doctor that he had pricked his finger with the needle, and was there any danger of him catching any kind of disease from doing so. Whereupon, the doctor responded that if the needle had been used several times, there would be a possibility of catching hepatitis or something of that nature. The doctor then turned to the petitioner and asked him if the needle was new or used. The petitioner stated the needle was a clean needle. (ROA p. 103, 104). All of these statements were made over the objection of the petitioner.

At trial, petitioner was convicted on May 17, 1978 of possession of heroin with punishment being fixed at six years imprisonment in the penitentiary. The case was appealed to the Alabama Court of Criminal Appeals and a decision was rendered on December 19, 1978, affirming the judgment. Petitioner submitted an application for rehearing on December 29, 1978; said application was overruled on January 16, 1979. Appellant then submitted a Petition for Writ of Certiorari to the Supreme Court of Alabama; said petition was granted on March 20, 1979; on September 21, 1979, the Writ of Certiorari was quashed as improvidently granted.

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of Alabama rendered below is in conflict with the decisions of the Supreme Court of the United States as to the standards which must be complied with under the

Fifth, Sixth and Fourteenth Amendments to the United States Constitution, regarding a persons constitutional rights not to be compelled to be a witness against himself and to have the assistance of counsel.

In its opinion quashing the petitioner's writ of certiorari, the Alabama Supreme Court held: "The writ of certiorari was granted to review the issue of whether a statement made by petitioner Floyd without having been given the *Miranda* warnings, and while in custody, was admissable as inculpatory statement against interest, therefore did not require a predicate of voluntariness. At first glance, it appeared from the opinion of the Court of Criminal Appeals that Floyd's statement was in response to questions of a police officer. Examination of the record to verify this point shows that the interrogation of Floyd was by a private person (his own physician) who was neither an instrumentality of the police nor acting at their direction."

Miranda v. State of Arizona, 384 US 436; 86 S.Ct. 1602; 16 L.Ed.2d 694 held: "That case, *Escobedo v. State of Illinois* was but an explication of basic rights that are enshrined in our Constitution that 'no person—shall be compelled in any criminal case to be a witness against himself,' and that 'the accused shall—have the assistance of counsel.' These precious rights were fixed in our Constitution only after centuries of persecution and struggle. In the words of Chief Justice Marshall, they were secured for 'ages to come, and—designed to approach immortality as nearly as human institutions can approach it.' *Cohens v. Commonwealth of Virginia,* 6 Wheat 264, 387, 5 L.Ed. 257 (1821)."

Miranda v. State of Arizona (supra) further held that, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." In this case petitioner was laying down in a hospital bed in an emergency room when the police officer initiated the questioning. (ROA p. 101). It is obvious from the trial transcript that the question concerning whether or not a needle was new or used was initiated by the police officer while petitioner was deprived of his freedom of action in a significant way and should not therefore have been allowed at trial. (ROA p. 102, 103).

It is obvious from *Miranda v. Arizona* (supra) that the rule set forth by the Court applied to *any statement* made by the suspect while in custody or deprived of his freedom in any significant way. Furthermore, no distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part of or all of an offense. Privilege against self incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination.

The privilege (self-incrimination) has come rightfully to be recognized in part as an individuals substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States v. Grunewald*, 233, F.2d 556, 579, 581-582 (Frank, J. dissenting), rev'd 353 US 391, 77 S.Ct. 963, 1 L.Ed.2d 931, (1957).

Miranda v. Arizona 86 S.Ct. at 1620 further held that:

"The Constitutional foundation underlying the privilege is the respect a government—State or Federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state—individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore Evidence 317 (McNaughton Rev. 1961), to respect the inviolability of the human personality, our accusitory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers v. State of Florida* 309 US 227, 235-238, 60 S.Ct. 472, 476-477, 84 L.Ed. 716 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfeddered exercise of his own will." *Malloy v. Hogan*, 378, US 1, 8, 84 S.Ct. 1489, 1493, 12 L.Ed.2d 653 (1964). It is obvious again from the trial transcript that petitioner had not been given his constitutional rights nor did he understand his constitutional rights before he made the statement concerning the needle. (ROA PS. 104)

"Without the protections flowing from adequate warning and the right of counsel, all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised of the police." *Mapp v. Ohio*, 367 US 634, 685, 81 S.Ct. 1684, 1707, 6 L.Ed.2d 1081 (1961). See *F. Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d. 923, (1965); *Miranda v. State of Arizona*, 86 S.Ct. at 1624.

"The presence of a lawyer can also guarantee that the accused gives a fully accurate statement to the police and that the statement is *rightly reported* by the prosecution at trail." *Miranda v. Arizona*, 86 S.Ct. at 1626, *Crocker v. State of California*, 357 U.S. 433, 443-448, 78 S.Ct. 1287, 1293-1296, 2 L.Ed.2d, 1448, (1958). This is particularly important in the present case because the doctor present when the incriminating statement was supposedly made did not remember that the statement was ever made. (ROA p. 60.)

Again this Court in *Miranda v. Arizona* 86 S.Ct. at 1628 held "If the interrogation continues without the presence of an attorney and the statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to retained or appointed counsel. *Escobedo v. State of Illinois*, 378 U.S. 478, 490, N. 14, 84 S.Ct. 1758, 1764, 12 L.Ed.2d 977. It is important to note that in the present case there was never such a showing. (ROA PS 104.)

Custody has been found where the accused is undergoing medical treatment. *People v. Layton*, (1972) 29 Cal. App. 3d 349, 105 Cal. Rptr. 509; *State v. Evans*, (1969 Mo.) 439 S.W. 2d; *State v. Ross*, (1968) 183 Neb. 1, 157 N.W. 2d. 860.

It is petitioner's contention that any police activity which is designed to or likely to elicit a confession is an "interrogation", and the response is not a voluntary one of the sort which escapes the necessity for Miranda Warnings.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment of the Supreme Court of Alabama.

Respectfully submitted,

JOHN MARK McDANIEL
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313 Franklin Street
Huntsville, Alabama 35801
(205) 534-3018

Counsel for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

AFFIDAVIT OF PROOF OF SERVICE

State of Alabama County of Madison

I, the undersigned, John Mark McDaniel, 313 Franklin Street, Huntsville, Madison County, Alabama 35801, hereby certify that I have deposited for service three (3) printed copies of a Petition for Writ of Certiorari to the Honorable Charles Graddick, the Attorney General for the State of Alabama, Montgomery, Alabama, and forty (40) printed copies to the Clerk of the Supreme Court of the United States.

This the 14th day of December, 1979.

JOHN MARK McDANIEL
McDANIEL & McDANIEL ATTORNEYS
313 Franklin Street
Huntsville, Alabama 35801
(205) 534-3018

State of Alabama County of Madison

Subscribed and sworn to before me on this the 14th day of December, 1979.

Denise Capper
NOTARY PUBLIC

My commission expires the 16 day of Feb, 1983

APPENDIX A

Bryan FLOYD

v.

STATE

8 Div. 138.

Court of Criminal Appeals of Alabama.

Dec. 19, 1978

Rehearing Denied Jan. 16, 1979

Defendant was convicted before the Circuit Court, Madison County, Thomas N. Younger, J., of possessing herion, and he appealed. The Court of Criminal Appeals, Bowen W. Simmons, Retired Circuit Judge, held that: (1) conversation in which defendant, while in hospital, told his family physician that needle discovered where he was found at entrance of restroom while unconscious with herion or other items in close proximity to him was not a part of res gestae, and, thus, was not admissible as such; (2) such statement by defendant to physician was admissible as an inculpatory statement against interest and was not a "confession" which would require a predicate of voluntariness, and (3) testimony presented a question for jury's determination as to guilt.

Affirmed.

Writ quashed, Ala. 375 So.2d 280.

Appellant appeals from a judgment entered pursuant to a jury's conviction on an indictment for possessing heroin, a controlled substance. Section 20-2-23, Code of Ala. 1975. The trial court fixed punishment at six years imprisonment in the penitentiary. Section 20-2-70, Code of Ala. 1975.

The defendant was discovered by a legal secretary shortly after 2:00 p.m., October 17, 1977, lying on the floor at the entrance of a restroom used by the occupants of the law office of Johnston & Johnston in Huntsville, Alabama.

A police officer, Ronald Adams, while patrolling in a police car in front of the building, heard a police dispatch about the incident. He immediately responded to the call and went to the scene. An ambulance with some medics also reported to the scene about the same time the officer arrived.

Officer Adams found the defendant lying on the floor unconscious or in a comatose state with his feet and legs inside the restroom and the rest of his body outside in the foyer adjacent to the restroom. The defendant's pants and underwear were down around his ankles. A shirt was on the floor, at or near his feet. Lying on the shirt were certain articles or items as follows: a Bic cigarette lighter, a metal teaspoon, a used hypodermic syringe, a tie that had been tied in the shape of a tourniquet, and five cotton balls on one of which were smudges of a red substance. Also in the immediate area were a pair of sun glasses and a comb. Lying on a shirt in the same area, the officer found a "little tinfoil pack about one inch and a half square. Inside of this tinfoil was a piece of cellophane. Inside of the cellophane was a white substance." Officer

Adams also testified that he saw "what appeared to be needle tracks on both arms of the defendant."

A state toxicologist testified later in the trial that this white substance contained 86 percent heroin.

The medics took the defendant in their ambulance to the emergency room of a nearby hospital where a nurse promptly gave him a shot of Narcan which was an antidote for narcotics. This was about 2:35 p.m.

The defendant's family physician, Dr. Robertson, arrived at the hospital about 2:45 p.m. to see the defendant. He testified that he saw defendant promptly; that he was awake, alert, and answered questions well. He testified that, "he would not tell me what he had given himself, if he had." He also testified that there was no indication that defendant had suffered a heat stroke or heat prostration, or exhaustion. It is to be noted that defendant entered the restroom area from the roof of the building housing the restroom where he had been employed to repair the roof.

Dr. Robertson further testified that according to his notes defendant also had "numerous puncture wounds, both antecubital veins and with induration present." He explained that "the antecubital areas are these areas of both arms, and the indurations mean just firmness."

Officer Adams, in testifying about seeing the needle tracks on defendant's arms, also stated that the track on the left arm "was sort of moist and had a little blood on his arm." He further testified that "there were more marks, but they were not fresh."

Mr. Thompson, the attorney who went to the scene, testified that he did not see the items that Officer Adams listed that he saw.

There was some conflict in the testimony of the State's witness relative to the exact position that defendant was lying when found.

Resolution of these conflicts was for the jury.

It appears further in the evidence that Officer Adams, while handling the shirt in which the needle and syringe were wrapped, pricked his finger when it came in contact with the needle's point. When the officer reached the hospital, he inquired of Dr. Robertson if there was any danger of disease or infection. Dr. Robertson replied that there was a possibility that if the needle had been used several times that Officer Adams "could have hepatitis or something of that nature." We quote:

"Q. Then, what, if anything occurred?

"A. He turned around to the Defendant—

"MR. McDANIEL: I object.

"THE COURT: Overruled.

"A. And he asked the Defendant if it was a new needle, if it had been used before.

"Q. Was there a response from this Defendant? Yes or no?

"A. Yes.

"MR. McDANIEL: Objection, Your Honor.

"THE COURT: Overruled.

"A. Yes, there was.

"Q. What was that response?

"A. The Defendant stated that it was a clean needle.

"Q. Or was it clean or hadn't been used before?

"A. He stated that it was clean and hadn't been used before.

"Q. Did he state that or did you just infer it?

"A. He stated it.

"Q. All right, sir. Did you have occasion there to talk with this Defendant?

"A. No, sir, I did not talk to him.

"Q. Did you give him his *Miranda* warnings or rights?

"A. No, sir.

"Q. Did you charge him with any offense?

"A. No, sir, I did not.

> "MR. MILLER: We have no other questions at this time."

It appears that Dr. Robertson had testified that he did not recall having any conversation with defendant "concerning a syringe there."

(1) Defendant contends, and we think correctly so, that the conversation between him and Dr. Robertson was not a part of the res gestae and, therefore, was not admissible as such. The conversation occurred at a time and place too far removed (namely, the hospital) from the restroom where defendant was lying with the heroin and other items in close proximity to his person. *Guntharp v. State,* 54 Ala.App. 363, 308 So.2d 722(2). However, the testimony was admissible to which we now allude.

(2) We think that the defendant's reply, made in the presence of Officer Adams, was an inculpatory statement against interest when considered along with other testimony and was admissible. It could be reasonably inferred from the answer that defendant knew about the needle and its use and that he was in possession of it or had it under his control.

A like inference could be drawn that, if he knew about the needle, he also knew about the other kindred items found along with the needle and that they also were in his possession or under his control.

We do not think that defendant's statement about the needle was a "confession" that required a predicate of voluntariness. It was, as we have pointed out, a statement against interest.

The Alabama Supreme Court in *Tillison v. State,* 248 Ala. 199, 27 So.2d 43(6, 7), observed:

> ". . . ' . . . Statements of collateral facts, not criminating within themselves, but depending on other and outside evidence, disclosing a chain of circumstances incriminating in character, are not confessions within the rule requiring the laying of a predicate, but are deemed voluntary.' "

See also: *Heningburg v. State,* 153 Ala. 13, 45 So. 246; *Herring v. State,* 242 Ala. 85, 5 So.2d 104; 6 *Alabama Digest,* Criminal Law, 531.

We hold that the court was correct in overruling the defendant's motion to suppress; also in denying his motion to exclude the evidence. The defendant did not take the stand.

(3) We also think and so hold that the testimony of the witnesses presented a question for the jury's determination as to defendant's guilt vel non of the charge embraced in the indictment.

There was no motion for a new trial.

The judgment is due to be affirmed; it is so ordered.

The foregoing opinion was prepared by the Honorable BOWEN W. SIMMONS, a Retired Circuit Judge, serving as a judge of this court under the provisions of § 6.10 of the new Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of the court.

AFFIRMED.

All the Judges concur.

APPENDIX B

Ex parte Bryan FLOYD.

In re Bryan Floyd

v.

State.

78-254.

Supreme Court of Alabama.

Sept. 21, 1979.

Certiorari to Court of Criminal Appeals.

John Mark McDaniel, of McDaniel & McDaniel, Huntsville, for Bryan Floyd.

Charles A. Graddick, Atty. Gen. and Karen Neal Daniel, Asst. Atty. Gen., for the State.

EMBRY, Justice.

The writ of certiorari is quashed as improvidently granted. The writ was granted to review the issue of whether a statement made by petitioner Floyd without having been given the *Miranda* warnings, and while in custody, was admissible as an inculpatory statement against interest, therefore did not require a predicate of voluntariness. At first glance, it appeared from the opinion of the Court of Criminal Appeals that Floyd's statement was in response to questions of a police

officer. Examination of the record to clarify this point shows that the interrogation of Floyd was by a private person (his own physician) who was neither an instrumentality of the police nor acting at their direction.

Writ quashed.

TORBERT, C.J., and BLOODWORTH, FAULKNER and ALMON, JJ., concur.